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No. 02-69

IN THE

Supreme Court of the United States

JOSEPH C. ROELL, PETRA GARIBAY, AND JAMES REAGAN,
Petitioners,

v.

JON MICHAEL WITHROW,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the court of appeals correctly vacate a final judgment entered by a magistrate judge on the ground that two defendants did not consent to the referral to the magistrate judge prior to trial, as required by both the Federal Magistrates Act, 28 U.S.C. § 636(c)(1), and the local rules of the district court?

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BRIEF FOR RESPONDENT

The issue in this case is whether the Federal Magistrates Act requires parties to consent before a magistrate judge presides at trial and enters judgment, as respondent Jon Michael Withrow argues, or permits post-judgment consent, as petitioners contend. The text of the Magistrates Act states that all parties must consent before a magistrate exercises case-dispositive authority, and the legislative history confirms that Congress intended the parties to consent prior to trial. And for good reason. Under a post-judgment consent rule, parties have an incentive to withhold consent, await the outcome of trial, and then consent only if they prevail. If, on the other hand, a non-consenting party lost, that party could then refuse to consent and demand a retrial, thereby delaying the administration of justice, wasting judicial resources, and increasing the workload of Article III judges—undermining Congress' purpose in enacting the Magistrates Act. Moreover, petitioners' "heads I win, tails you lose" proposition is unfair to litigants, such as Withrow,

who consent before trial and thus, in petitioners' view, are locked into the final result even though their opponents are free to demand a new trial.

STATEMENT OF THE CASE

A. Statutory Background

In 1979, the Federal Magistrates Act, 28 U.S.C. §636, was amended to allow magistrates to exercise case-dispositive authority that is otherwise reserved for Article III judges. The Act states that, "[u]pon the consent of the parties," magistrate judges "may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case" when "specially designated to exercise such jurisdiction" by the district court. *Id.* §636(c)(1). In those cases, magistrates assume the role of Article III judges: They preside at trial and issue judgments.[1]

The procedure for referring a case for disposition by a magistrate is addressed in §636(c)(2) of the Magistrates Act and in Federal Rule of Civil Procedure 73(b). Section 636(c)(2) provides that the "decision of the parties" whether to consent to the referral "shall be communicated to the clerk of court." Rule 73(b) sets forth the mechanism by which the parties give their consent:

> Consent. When a magistrate judge has been designated [by the district court] to exercise civil trial jurisdiction, the clerk shall give written notice to the parties of their opportunity to consent to the exercise by a magistrate judge of civil jurisdiction over the case, as authorized by Title 28, U.S.C. §636(c). If, *within the period specified by local rule*, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of

[1] We use the terms "magistrate judge" and "magistrate" interchangeably throughout the brief.

> consent or separate forms of consent setting forth such election.

(emphasis added). The Federal Rules of Civil Procedure also provide a sample consent form. Fed. R. Civ. P. Appendix of Forms, Form 34.

The United States District Court for the Southern District of Texas—the relevant district court here—has established detailed procedures governing the referral of cases to magistrate judges, as have most district courts. At the time Withrow's case was filed, the procedures for referral to magistrate judges in the Southern District of Texas were governed by General Order No. 80-5.[2] That order instructed the clerk of the court to notify the parties that they may consent to have a magistrate "conduct any or all proceedings in the case and order the entry of a final judgment." General Order No. 80-5, Art. III §B(1), Br. in Opp. to Pet. for Cert., App. 7A. The notice was to be mailed to the plaintiff at the time the action was filed and to the other parties as attachments to copies of the summons and complaint. The General Order provided that a case could only be referred to a magistrate judge if consent was first provided in writing by all the parties:

> 2. *Execution of Consent.*
>
> The clerk shall not accept a consent form unless it has been signed by all the parties in a case. The plaintiff shall be responsible for securing the execution of a consent form by the parties and for filing such form with the clerk of court. No consent form will be made available, nor will its contents be made known to any district judge or magistrate, unless all parties have consented to the reference to a magistrate. No district judge, magistrate, or

[2] General Order 80-5 has been replaced by General Order 2001-6, which is substantially similar and also requires that all parties consent prior to referral to a magistrate judge.

other court official may attempt to persuade or induce any party to consent to the reference of any matter to a magistrate. This rule, however, shall not preclude a district judge or magistrate from informing the parties that they may have the option of referring a case to a magistrate.

3. *Reference*

After the consent form has been executed and filed, the clerk shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate. *Once the case has been assigned to a magistrate*, the magistrate shall have the authority to conduct any and all proceedings to which the parties *have consented* and to direct the clerk of the court to enter a final judgment in the same manner as if a district judge had presided.

Br. in Opp. to Pet. for Cert., App. 7A (emphasis added).

B. Factual Background

In May of 1995, Jon Michael Withrow fell from his prison bunk and broke his ankle. Withrow was taken to the prison infirmary, where he was given pain medication and a bandage. He was returned to the prison population, where he had to walk around the prison to obtain food, clothing, and other necessities. It was not until three days later that prison doctors ordered X-rays, which confirmed that Withrow had broken his ankle. Withrow was admitted to the hospital six days after the accident, where he underwent surgery. Complaint ¶¶ 17-124 (D.E. 1). It is undisputed that Withrow had a severely broken ankle, was required to undergo surgery, and has never regained full use of his ankle. Tr., Final Pretrial Conference and Jury Trial—Day One, Vol. 1, p. 114 (D.E. 229) (opening statement of counsel for defendants).

On April 30, 1997, Withrow filed this *pro se* lawsuit under 42 U.S.C. §1983 charging that Joseph Roell and James Reagan, prison physicians, and Petra Garibay and Danny Knutson, prison nurses, were deliberately indifferent to his medical needs in violation of the Eighth Amendment. The case was assigned to United States District Judge Hayden Head.

The issue of consent to referral to a magistrate judge first came up at a *Spears* hearing on September 9, 1997, before Magistrate Judge B. Janice Ellington.[3] Withrow and Jean Wong from the Texas Attorney General's office attended the hearing. Magistrate Judge Ellington explained that she could decide case-dispositive matters only if both the defendants and Withrow consented to have her preside at trial and enter final judgment. Joint Appendix ("J.A.") 10-11. Withrow gave express oral consent at the hearing, and then signed a consent form that was filed with the court. J.A. 11; Cert. Pet. App. 20a. Ms. Wong did not consent, explaining that "[t]hese two cases for today have not been assigned so I would not be able to consent at this time, but the attorneys that will be assigned will be able to make that decision." J.A. 11. The Magistrate Judge asked Ms. Wong if she would "talk to the attorneys who have been assigned the case to see if they will execute consent forms?" *Id.* Ms. Wong responded "Yes, Your Honor, I'll do that." *Id.*

The district court did not await the consent of defendants, as the local rules required, but instead referred the case to Magistrate Judge Ellington on December 29, 1997. Cert. Pet. App. 16a-17a, 21a. In his referral order, Judge Head noted that only plaintiff had consented, and he stated that "all defendants

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[3] In the Fifth Circuit, a *Spears* hearing substitutes for a motion for a more definite statement in *pro se* cases and provides an opportunity for the court to dismiss the case as frivolous if the complaint lacks legal or factual support. *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). In Withrow's case, the magistrate found the evidence sufficient to proceed to trial.

will be given an opportunity to consent to the jurisdiction of the magistrate judge. If all defendants do not consent, this order of reference will be vacated, and the case will be returned to the docket of this judge for final disposition." *Id.*

On January 14, 1998, Magistrate Judge Ellington ordered the clerk to send to defendants Judge Hayden's December 29, 1997 Order, along with a summons and a copy of the complaint. Defendants were directed to respond to the complaint and in their response to "include a statement that 'All defendants consent to the jurisdiction of a United States Magistrate Judge' or 'All defendants do not consent to the jurisdiction of a United States Magistrate Judge.'" J.A. 13. Defendant Reagan responded that he consented to the referral; defendants Roell and Garibay did not indicate whether or not they consented. Cert. Pet. App. 17a.[4]

During a telephone hearing on April 27, 1999, Magistrate Judge Ellington reminded counsel for defendants that "all defendants need to consent before I can hear a case," J.A. 16, but defendants did not consent orally or in writing at that time or thereafter. Again, on July 21, 1999, Magistrate Judge Ellington raised the issue of consent, but defendants did not consent to the referral. J.A. 18.

The defendants filed a motion for summary judgment, which the magistrate denied because she concluded that genuine issues of material fact were in dispute and that defendants were not entitled to qualified immunity. Cert. Pet. App. 25a-26a. The case then went to trial before a jury. During jury selection, Magistrate Judge Ellington stated incorrectly that the parties had consented to a trial before a magistrate. *Id.* at 27a. Defendants Roell and Garibay neither agreed with nor objected to this statement, nor did they use the occasion to consent to the reference, although they and their counsel were present in court.

[4] Defendant Knutson settled and was dismissed from the suit on October 20, 1999.

Cert. Pet. App. 18a. After a three-day trial, the jury returned a verdict for defendants. Magistrate Judge Ellington issued judgment in favor of defendants on May 15, 2000. *Id.* at 28a. Withrow then filed a timely notice of appeal.

C. Post-Trial Proceedings.

On November 21, 2000, before any briefs were filed, the Fifth Circuit *sua sponte* remanded the case to the district court "to determine whether the parties consented to proceed before the magistrate judge and, if so, whether the consents were oral or written." Cert. Pet. App. 13a. The Fifth Circuit retained jurisdiction pending district court compliance with its order. *Id.*

On remand, defendants Roell and Garibay consented for the first time. They filed written consent, in which they stated that "they consented to all proceedings before this date before the United States Magistrate Judge, including disposition of their motion for summary judgment and trial." Cert. Pet. App. 22a.

The district court referred the issue to Magistrate Judge Ellington for a report and recommendation. Cert. Pet. App. 16a. Magistrate Judge Ellington noted that all defendants had been directed to file a statement as to whether they consented to trial before a magistrate judge at the time they received service of process, but that only defendant Reagan had complied with that order. *Id.* at 17a. Nor had defendants Roell and Garibay given oral consent to the reference in the six hearings that preceded the trial. *Id.* Magistrate Judge Ellington concluded that defendants Roell and Garibay had not expressly consented until after the jury issued its decision, and that such belated consent failed to confer on her the authority to preside at trial and issue a judgment. *Id.* at 19a. The district court adopted the report and recommendation over defendants' objections, and the case returned to the Fifth Circuit. *Id.* at 14a.

In his appellate brief, Withrow argued that 28 U.S.C. §636(c)(1) requires pretrial consent and thus that Magistrate

Judge Ellington had no authority to enter a final judgment. He explained that he "was completely unaware that Defendants Garibay and Roell had not consented until this Court notified him of such." Withrow's Appellate Br. at 9, *Withrow v. Roell*, 288 F.3d 199 (5th Cir. 2002). Withrow also expressed his concern that defendants had engaged in gamesmanship, noting that although the question whether the parties had consented was raised on numerous occasions, defendants had carefully avoided either granting or withholding consent. *Id.* at 5-7. Withrow argued that "the Defendants delayed consenting so that if they lost at trial a claim of lack of jurisdiction could be raised." *Id.* at 5.

Defendants acknowledged that whether the parties consented to referral of case-dispositive authority to the magistrate judge is a jurisdictional question subject to *de novo* review in the court of appeals. Defendants' Appellate Br. at 2, *Withrow v. Roell*, 288 F.3d 199 (5th Cir. 2002). This was not a problem, according to defendants, because "[a]lthough no written or oral consent to trial by [the] Magistrate appears in the record prior to the time of trial, Roell and Garibay did consent to the Magistrate's jurisdiction, as demonstrated by the actions of the lower court and all parties." *Id.* at 1. Defendants noted that the magistrate judge had discussed the need for all parties to consent at several hearings, and on a few occasions appeared to believe that defendants had already consented, but defendants admitted that they had never given explicit consent. *Id.* at 1-3. Defendants urged the Fifth Circuit to join the Seventh and Eleventh Circuits in concluding that "'belated' consent cures jurisdictional defects." *Id.* at 4.

The Fifth Circuit held that defendants had not consented to the referral prior to the trial, as required by the Magistrates Act. The court rejected defendants' argument that their post-judgment consent was sufficient, noting that the plain language of the Act makes consent a "condition precedent" to a magistrate judge's exercise of authority pursuant §636(c) and

that the legislative history confirms this reading. Cert. Pet. App. 8a. The court commented that the rule urged by defendants would lead to gamesmanship: Parties would be tempted to withhold consent, await the outcome of trial, and then consent only if they prevailed. *Id.* at 9a. In this very case, the court commented, "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." *Id.* at 10a. In addition, the Fifth Circuit explained that permitting post-judgment consent requires inferring from a party's post-judgment statement that the party had consented pretrial, which contradicts Fifth Circuit precedent that consent must be explicit, not inferred from the parties' actions. *Id.* at 9a-10a. Finding that defendants' lack of consent was a jurisdictional error, the Fifth Circuit vacated the judgment and remanded the case for retrial. *Id.* at 10a.

SUMMARY OF ARGUMENT

The Federal Magistrates Act, which states that magistrates may try cases and enter appealable orders "*upon* consent" of the parties, requires that parties communicate consent before magistrates exercise that authority. The legislative history confirms that Congress intended consent to come before, not after, a magistrate takes over the role of an Article III judge by presiding at trial and entering judgment. Because two defendants in this case did not consent until after trial, the magistrate had no authority to conduct the trial or enter judgment.

Congress did not intend to allow parties to consent after judgment. As defendants concede (Pet. Br. 35 n.13), such a rule would create an incentive for parties to withhold consent until after trials are complete, and then to give consent only if they won and demand a retrial if they lost. Such retrials would delay the administration of justice, waste judicial resources, and increase the workload of Article III judges, undermining the goals of the Magistrates Act. In addition, allowing parties to

withhold consent until after a verdict is unfair to those litigants, such as Withrow, who consent before trial and, in defendants' view, are bound into the final result even though their opponents are free to demand a new trial.

Even if the text, purpose, and legislative history of the Act were ambiguous—and they are not—the Act should be construed to avoid the serious constitutional concerns that arise when a non-Article III decision-maker presides over federal cases absent the parties' express consent. Because the parties' voluntary and informed consent is a constitutional prerequisite to a magistrate's exercise of case-dispositive authority, it must be given before, not after, a magistrate purports to exercise the powers of an Article III judge.

In addition, even assuming that the Magistrates Act does not itself require pretrial consent, it certainly does not prohibit district courts from requiring it. The local rules of the Southern District of Texas require that all parties file written consent before a magistrate judge can exercise case-dispositive authority pursuant to §636(c)(1). Because defendants failed to do so, the magistrate judge had no authority to preside over their case and enter judgment.

Failure to consent is an error that must be raised *sua sponte* by an appellate court. Lack of consent deprives magistrates of the power to conduct trials and enter judgments. Consequently, a purported "judgment" issued by a magistrate acting without the parties' unanimous consent is no more valid or appealable than one issued by a former magistrate judge whose term has expired. Appellate courts are not only permitted to raise, *sua sponte*, questions regarding a magistrate's authority to issue a judgment under review, they are required to do so.

ARGUMENT

I. THE FEDERAL MAGISTRATES ACT REQUIRES CONSENT OF ALL PARTIES BEFORE A MAGISTRATE JUDGE MAY PRESIDE AT TRIAL AND ENTER JUDGMENT.

A. Section 636(c) Mandates Unambiguous Pretrial Consent.

The Magistrates Act requires that all parties *unambiguously* consent *before* a magistrate can exercise case-dispositive authority under §636(c). Neither defendants' post-judgment statement of consent nor their pre-judgment conduct satisfied this requirement.

1. *All Parties Must Consent Before Trial Begins.*

The Magistrates Act provides: "Upon the consent of the parties, a full-time United States magistrate . . . may conduct any or all proceedings in a jury or nonjury civil matter and order the entry of judgment in the case . . . ." 28 U.S.C. §636(c)(1). "Upon" is defined as "thereafter; thereon." Webster's New Collegiate Dictionary 1285 (1977). Thus, under the plain language of the statute, consent is a "precondition" to the magistrate's exercise of case-dispositive power; without it, a magistrate cannot preside over a trial or enter judgment. *Pacemaker Diagnostic Clinic of Am., Inc. v. Instromedix, Inc.*, 725 F.2d 537, 540 (9th Cir. 1984) (*en banc*); *see also Wharton-Thomas v. United States*, 721 F.2d 922, 925 (3d Cir. 1983) ("consent is required before a magistrate may act under §636(c)"); S. Rep. 96-74, at 13 (1979) (consent is a "prerequisite" to magistrate's exercise of authority under §636(c)); H.R. Conf. Rep. 96-444, at 7 (1979); S. Conf. Rep. 96-322, at 7 (1979).

"Upon" is used repeatedly throughout the Act to mean "thereafter." For example, §636(h) states that a "magistrate judge who has retired may, *upon the consent* of the chief judge

of the district involved, be recalled to serve as a magistrate judge . . . ." (Emphasis added.) Even defendants must concede that a retired magistrate judge cannot return to his or her post *prior* to receiving the chief judge's consent to do so. Likewise, §636(e)(3), which allows magistrates to hold parties in contempt, provides that "[d]isposition of such contempt shall be conducted *upon* notice and hearing under the Federal Rules of Criminal Procedure." (Emphasis added.) Without question, a party cannot be held in contempt without first being given notice and a hearing. Because the normal rule of statutory construction "assumes that identical words used in different parts of the same act are intended to have the same meaning," *Sorenson v. Secretary of the Treasury*, 475 U.S. 851, 860 (1986) (internal citations and quotations omitted), the word "upon" in §636(c)(1) must mean "thereafter" just as it does in §§636(h) and (e)(3).

Several other provisions of the Act confirm that the parties must consent before a magistrate may preside at trial and enter judgment. For example, §636(c)(2) requires the clerk to notify the parties of the availability of a magistrate "at the time the action is filed," after which the "decision of the parties [whether to consent] shall be communicated to the clerk of court." This provision strongly suggests that the parties' decision will be communicated to the clerk soon after the action is filed, not after judgment is entered. If the parties do not consent, §636(c)(2) provides that "either the district court judge or the magistrate may again advise the parties of the availability of the magistrate, but in so doing, shall also advise the parties that they are free to withhold consent without adverse substantive consequences." Neither the district judge nor the magistrate could continue to inform the parties of the availability of a magistrate, or advise parties that they are free to withhold consent without adverse

consequences, if judgment had already been entered by a magistrate.[5]

Furthermore, §636(e)(3) grants magistrates contempt authority "[i]n any case in which a United States magistrate judge presides *with the consent* of the parties under subsection (c) of this section . . ." (emphasis added). Magistrates' power to penalize parties for contempt of court during civil proceedings, like their power to preside over those proceedings in the first place, emanates from the parties' consent. The magistrate, of course, needs to know whether he or she can issue contempt citations at the time of the trial, and thus it makes no sense to read the Act as permitting parties to consent after a trial is concluded.

In sum, the text of the Magistrates Act requires pretrial consent. Because defendants did not consent until after they received a judgment in their favor, Magistrate Judge Ellington never had authority to preside over the trial or issue the judgment.

---

[5] In a now-repealed provision of the Magistrates Act, Congress gave parties in §636(c)(1) cases the option to appeal the magistrate's final judgment to the district court, rather than to the circuit court. The Act provided that "at the time of reference to a magistrate, the parties may further consent to appeal on the record to a judge of the district court . . . ." The Federal Magistrate Act of 1979, Pub. L. No. 96-82, §2(2), 93 Stat. 643 (previously codified at 28 U.S.C. §636(c)(4)) (repealed 1996). Parties can only be described as "further" consenting to appeal to a district court if they have *already* consented to the magistrate's exercise of jurisdiction over their case.

In the legislative history discussing this provision, Congress raised concerns about the timing of consent and the potential for gamesmanship. The House Report stated that, "to prevent gamesmanship on the part of attorneys, parties should consent to where their appeal goes *at the same time as they consent to trial by the magistrate*." H.R. Rep. No. 96-287, at 6 (1979) (emphasis added).

2. *Silence Is Not Consent.*

Defendants argue that their post-judgment consent merely "confirmed" that they had consented all along. Pet. Br. 34. In an effort to portray themselves as having consented before judgment, defendants contend that proceeding before the magistrate without objection was equivalent to giving consent. Pet. Br. 28-34.

Try as they might, defendants cannot transform silence into consent. "Consent" is defined as "[a]greement, approval, or permission as to some act or purpose, esp. given voluntarily by a competent person." Black's Law Dictionary 300 (7th ed. 1999). The Act requires that the parties "*affirmatively* and mutually relinquish [their] right [to an Article III judge] in order for a magistrate to try the litigation." Peter G. McCabe, "The Federal Magistrate Act of 1979," 16 Harv. J. Legis. 343, 374 (1979) (emphasis added). Defendants never did so. Defendants' "[f]ailure to object is not equal to consent," *Rembert v. Apfel*, 213 F.3d 1331, 1334 (11th Cir. 2000), and thus defendants' inaction did not permit Magistrate Judge Ellington to exercise the case-dispositive authority otherwise reserved for Article III judges.[6]

To read "consent" from silence, as defendants propose, would turn §636(c)(1) on its head: Congress provided that Article III judges must preside over civil cases unless all the parties *consent* to a magistrate judge; defendants argue that magistrate judges may preside unless a party *objects* and insists upon an

[6] Every circuit court to address the issue has concluded that consent must be clear and unambiguous, not implied. *See, e.g., Rembert*, 213 F.3d at 1334-35; *Nasca v. Peoplesoft*, 160 F.3d 578, 579 (9th Cir. 1998); *Mark I, Inc. v. Gruber*, 38 F.3d 369, 370 (7th Cir. 1994); *New York Chinese TV Programs, Inc. v. U.E. Enters., Inc.*, 996 F.2d 21, 23-24 (2d Cir. 1993); *Ambrose v. Welch*, 729 F.2d 1084, 1085 (6th Cir. 1984); *Glover v. Alabama Bd. of Corrections*, 660 F.2d 120, 124 (5th Cir. 1981).

Article III judge. In essence, defendants would transform §636(c)(1) from an opt-in to an opt-out system.[7]

Federal Rule of Civil Procedure 73(b) confirms that consent cannot be inferred. That Rule states that the parties "shall execute and file a joint form of consent or separate forms of consent setting forth such election." Defendants acknowledge the existence of Rule 73(b), Pet. Br. 30 n.11, but nonetheless appear to argue that consent need not be in writing. Pet. Br. 13. The Federal Rules of Civil Procedure have the same binding effect as any statute and thus defendants have no basis for claiming that written consent is not required. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988). Although the

[7] The Judicial Conference's Committee on the Administration of the Magistrate Judges System considered whether the Magistrates Act should be "modif[ied]" by "adoption of an 'opt out' or waiver system of obtaining litigant consent to civil trial before a magistrate judge to replace the specific consent requirement in the Federal Magistrates Act." Magistrate Judges Division of the Administrative Office of the United States Courts, "A Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. 247, 305 (1993). The Committee ultimately decided "not to endorse th[is] proposed modification[]." *Id.*

As defendants note, several district courts assign cases to magistrate judges in the first instance, but then require that the cases be reassigned to a district judge if the parties do not consent. Pet. Br. 32 n.12. Such rules acknowledge that, absent consent, a magistrate may not preside at trial or issue judgment. Although a few district courts have, in the past, established local rules allowing magistrates to preside unless the parties objected, these opt-out systems have been rejected by every circuit to review them. *See, e.g., Rembert*, 213 F.3d at 1334-35 (finding the Southern District of Alabama's "consent through inaction" system insufficient to establish the consent required before a magistrate can act pursuant to 28 U.S.C. 636(c)); *Hajek v. Burlington N. R.R. Co.*, 186 F.3d 1105, 1109 (9th Cir. 1999) (holding District of Montana's opt-out rule invalid). The District of New Hampshire is the only district that currently maintains an opt-out rule. *See* D. N.H. LR 73.1(b)(2)(B); *see also* Appendix to this Brief (describing local rules in 89 district courts). To our knowledge, New Hampshire's rule has never been reviewed by any court.

question whether consent must be in writing is not directly presented here, Rule 73(b)'s requirement that parties file consent forms with the district court lays to rest any argument that consent may be inferred.

Other provisions in the Magistrates Act corroborate that Congress intended the parties to articulate consent explicitly before a magistrate exercises case-dispositive authority under §636(c)(1). For example, §636(c)(2) provides that "the decision of the parties" whether to consent to the referral "shall be communicated to the clerk of court." Silence and inaction can never be "communicated" to anyone, and therefore a party's failure to object to the referral cannot be what Congress considered to be "consent." Likewise, §636(h) provides that a retired magistrate may be recalled to service "upon the consent" of the chief judge. The chief judge's failure to object to a retired magistrate's return to the bench obviously could not satisfy this requirement. In short, the consent requirement in §636(h), as in §636(c)(1), requires an affirmative act, not simply a failure to object to the status quo.

If, as defendants suggest, pretrial conduct could somehow legitimize post-judgment consent, courts would be forced to comb through the record, studying parties' actions leading up to trial to determine whether parties' conduct somehow reflected the consent they failed to memorialize. Indeed, defendants' ambiguous pre-trial conduct in this very case illustrates the problem, because it is far from clear—and certainly not undisputed—that defendants' conduct before trial "clearly evidence[d] consent." Pet. Br. 9. *See* Part II, *infra* at 24-26 (explaining that because defendants' conduct did not give "clear evidence" of consent, defendants cannot prevail even if the Act is read as they suggest). Congress could not have wanted to force courts to delve into the record and examine every aspect of a party's pretrial conduct in an attempt to read that party's mind. This Court should reject defendants' construction not only because it is odds with the text of the Act

and is unfair to consenting litigants, but also to "avoid[] an interpretation" of the Act that would "'spawn[] a second litigation of significant dimension.'" *Buckhannon Bd. & Care Home, Inc. v. West Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 609 (2001) (quoting *Texas State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791 (1989)).

Significantly, defendants concede that nothing about their pre-judgment conduct would have prevented them from insisting, after judgment, that they had *not* consented to the referral to the magistrate. Defendants do not argue that pre-judgment conduct alone can satisfy §636(c)'s consent requirement, because they acknowledge that inferring consent solely from a party's conduct is not sufficiently "protective of Congress' voluntariness concerns." *See* Pet. Br. 35 n.12; *see also* Pet. Br. 33-34 (stating that their pre-judgment conduct and their post-judgment consent together satisfy §636(c)'s consent requirement because these "*two forms of consent* unambiguously establish a magistrate judge's authority to preside over a civil trial and to direct entry of judgment") (emphasis added). Thus, under defendants' reading of §636(c)(1), they had the option, at the end of trial, of *either* demanding a new trial before an Article III judge *or* giving explicit, post-judgment consent.

Because they won at trial, defendants explicitly consented. However, as the Fifth Circuit commented, "had the verdict been favorable to Withrow, we doubt Defendants would have given consent post-judgment." Cert. Pet. App. 10a. Nothing about defendants' ambiguous pretrial conduct would have prevented them from doing so. In essence, then, defendants read the Act as a one-way street: The party who consents pre-judgment is stuck with the result at trial, while the party who withholds consent may choose either to accept the verdict or demand a new trial.

B. The Legislative History And Purpose Of The Federal Magistrates Act Confirm That Consent Must Precede Trial And Judgment.

The legislative history confirms that Congress meant what it said: All parties must consent before a magistrate can exercise jurisdiction under §636(c). The Senate Report explains that the "bill clearly requires the voluntary consent of the parties as a *prerequisite* to a magistrate's exercise of the new jurisdiction." S. Rep. 96-74, at 13 (emphasis added); *see also id.* at 4 ("[T]he voluntary consent of the parties is required *before* any civil action may be referred to a magistrate.") (emphasis added). Likewise, the House Conference Report explains that "the voluntary consent of the parties is required *before* a civil action may be referred to a magistrate for a final decision." H.R. Conf. Rep. 96-444, at 7 (emphasis added).

According to defendants, Congress was concerned only that consent be voluntary, and not about "the formalities of consent." Pet. Br. 24. But the timing of consent is not a "formality"; the parties must consent before a magistrate presides at trial and enters judgment because their consent is the sole source of the magistrate's power to act in the place of an Article III judge. Moreover, requiring pre-judgment consent furthers Congress' goal of ensuring the "voluntariness, knowingness, and willingness of the consent." *See* S. Conf. Rep. No. 96-322, at 8. A party's failure to consent pretrial raises the possibility that the party is unaware that the magistrate judge is not an Article III judge, or is ignorant of the right to insist that an Article III judge preside over the case. Requiring all parties to give unambiguous pre-trial consent ensures that the parties are voluntarily choosing to have their case heard by a magistrate, just as Congress intended.

Defendants' post-judgment consent rule is also at odds with Congress' purposes in enacting the Magistrates Act. Congress hoped that magistrates would reduce the workload on Article III judges, conserve judicial resources, and provide speedy access

to justice for litigants. H.R. Rep. No. 90-1629, at 4255, 4257 (1968). Under defendants' post-judgment consent rule, savvy litigants have every incentive to manipulate the system by withholding consent until after they learn whether they have won or lost the case. If a non-consenting party loses, that party can then demand a retrial before an Article III judge. *See, e.g., Mark I, Inc. v. Gruber*, 38 F.3d 369, 371 (7th Cir. 1994) (court gave parties opportunity to consent post-judgment, but nonconsenting defendant who had lost at trial declined to consent and successfully demanded a retrial). Article III judges would then be forced to empanel new juries and rehear cases, which would do nothing to alleviate their workload, would significantly delay the process, and would increase the costs of trials for the federal court system.

Another of Congress' goals in expanding the authority of magistrate judges was to "improve access to the Federal courts for the less-advantaged." S. Rep. No. 96-74, at 1. Presumably, then, Congress did not design the Magistrates Act to allow sophisticated litigants to game the system by withholding consent until after the verdict, which would be unfair to those "less-advantaged" litigants, such as pro-se prisoners like Withrow, who consent before judgment and thus, in defendants' view, could not escape an unfavorable verdict as could their non-consenting adversaries.

In contrast, requiring pretrial consent ensures that §636(c) will operate as intended. If all parties consent, the magistrate judge will preside over the entire case; if they do not, the case will be returned to an Article III judge for decisions on all dispositive issues. True, retrials will sometimes be necessary in the rare case that a magistrate mistakenly presides over a jury trial without realizing that one or more parties failed to consent. But strict application of the pretrial consent rule will motivate magistrates, judges, parties, and clerks to be vigilant in ensuring that every party has clearly consented before taking a case to trial before a magistrate. Moreover, whereas under a pretrial

consent system, retrials may occur as a result of an error, under defendants' post-judgment consent system, retrials would occur as part of the normal operation of the rule. Thus, the number of retrials under a pre-judgment consent rule will be far fewer than if parties are permitted to await the outcome of the trial before deciding whether to consent.

Defendants claim that requiring retrial absent unanimous, pretrial consent would also inspire parties to "game" the system. They posit that, if the courts do not accept belated consent, "'a litigant who knew that the *other* side had not consented could wait until judgment and raise the problem only if he lost.'" Pet. Br. 35 (quoting *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (7th Cir. 1995)). Although conceivable, this type of gamesmanship will happen very rarely, because the issue is not solely within the consenting party's control and the risks are formidable. If the consenting party wins, the lack of consent can thereafter be raised by his or her non-consenting adversary, or by the district or appellate court, requiring retrial and depriving the consenting party of victory. In any case, parties can prevent such gamesmanship by their opponents simply by consenting.

The Magistrates Act is nearly universally understood to require pretrial consent by courts around the country. Local rules in 58 districts explicitly require pretrial consent, and the local rules in another 14 districts track the "upon consent" language of the Act. *See* Appendix to this Brief 1a-7a. Sixteen districts have no rule regarding the timing of consent. *Id.* at 7a-8a. Only one district—the district of New Hampshire—maintains the rule that consent may be inferred from inaction. D. N.H. LR 73.1(b)(2)(B); *see also* Appendix to this Brief 8a. Therefore, it is not surprising that in the 24 years since the 1979 amendments provided magistrates with case-dispositive authority, only a handful of cases in four circuits discuss problems arising after a trial was held mistakenly without the consent of all parties. The bright-line rule urged by Withrow

will preserve the status quo, while the inferred-consent-plus-post-judgment-confirmation scheme proposed by defendants will greatly exacerbate the problem.

As defendants note, magistrates have become an essential part of the federal court system. *See* Pet. Br. 16-21. To preserve magistrate judges' vital role, defendants argue that the consent requirement should be read "broadly" to permit belated consent. Pet. Br. 25-28. The success of the current system, however, only bolsters the argument for requiring pretrial consent. Parties already consent before trial in most cases because most litigants and courts believe that §636(c) and Rule 73(b) require it, and because pretrial consent is mandated by the rules of the great majority of district courts. *See* Appendix to this Brief 1a-7a. If the Act is construed to allow post-judgment consent, it will disrupt the use of magistrate judges by encouraging parties either to game the system or to insist on trial before an Article III to prevent their opponents from sandbagging them.[8]

C. Interpreting The Federal Magistrates Act To Permit Post-Judgment Consent Would Violate The Doctrine Of Constitutional Avoidance.

As discussed above, the text, purpose, and legislative history of the Federal Magistrates Act demonstrate that Congress required pretrial consent. In addition, reading the statute to permit a magistrate to preside at trial and enter final judgment without first obtaining the affirmative consent of all the parties

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[8] The Seventh and Eleventh Circuit decisions permitting post-judgment consent addressed the issue in only a few paragraphs and did not refer to the text or legislative history of the Magistrates Act in reaching that conclusion. *See Drake v. Minnesota Mining & Mfg. Co.*, 134 F.3d 878, 883 (7th Cir. 1998); *General Trading Inc., v. Yale Materials Handling Corp.*, 119 F.3d 1485, 1496-97 (11th Cir. 1997); *American Suzuki Motor Corp. v. Bill Kummer, Inc.*, 65 F.3d 1381, 1385 (7th Cir. 1995); *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 320-21 (7th Cir. 1995); *King v. Ionization Int'l*, 825 F.2d 1180, 1185 (7th Cir. 1987).

would raise serious constitutional questions and thus should be avoided. *See, e.g., Peretz v. United States*, 501 U.S. 923, 929 (1991) (describing the Court's "settled policy to avoid an interpretation of a federal statute that engenders constitutional issues") (citing *Gomez v. United States*, 490 U.S. 858, 864 (1989)); *Glover v. Alabama Bd. of Corrections*, 660 F.2d 120, 124 (5th Cir. 1981) (construing the parties' consent narrowly to avoid constitutional questions); *see also* Note, "Masters and Magistrates in the Federal Courts," 88 Harv. L. Rev. 779, 780-89 (1975) (discussing constitutional limitations on delegations of judicial power). This canon of constitutional avoidance is particularly important given the "inherent complexity" of Article III questions. *Peretz*, 501 U.S. at 949 (Marshall, J., dissenting); *Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 90 (1982) (Rehnquist, J., concurring in judgment) ("Particularly in an area of constitutional law such as that of 'Art. III Courts,' . . . rigorous adherence to the principle that this Court should decide no more of a constitutional question than is absolutely necessary accords with both our decided cases and with sound judicial policy.")

Delegation of Article III powers to non-Article III decision-makers implicates individual as well as structural interests. *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 848 (1986). Individuals, however, can choose to forgo their personal right to an Article III judge, and thus the "consent of litigants, in both criminal and civil cases, has become a key factor in determining the validity of a non-Article III tribunal." *See* "Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. at 290. Indeed, the overriding theme in this Court's Article III jurisprudence is the necessity of consent to the constitutionality of delegation of Article III powers. For example, in *Northern Pipeline,* the Court held that a "traditional" state common-law action could not be decided by a non-Article III bankruptcy judge absent the consent of the parties. 458 U.S. at 89-92 (Rehnquist, J., concurring in

judgment). Again, in *Schor*, the Court emphasized the importance of consent, noting that requiring the parties' consent not only addressed the problem of an individual's right to an Article III judge, but also lessened the structural concerns that arise when Article III powers are delegated to non-Article III courts. 478 U.S. at 854-55 (noting that concerns over erosion of separation of powers are lessened when litigants are free to choose the forum for adjudication).

Consent is just as vital in the context of the Federal Magistrates Act. In *Gomez*, the Court discussed the 1979 amendments and commented that a "critical limitation on this expanded jurisdiction is consent." 490 U.S. at 870. Illustrating the significance of consent, *Gomez* held that a magistrate judge may not preside at jury selection in a felony trial absent the defendant's consent. But just a few years later, in *Peretz*, this Court upheld the delegation of that very power because the parties had consented. The Court explained that "[t]his case differs critically from *Gomez* because petitioner's counsel, rather than objecting to the Magistrate's role, affirmatively welcomed it." 501 U.S. at 932.

Although this Court has never addressed the constitutionality of §636(c), twelve courts of appeals have upheld this expansion of magistrate judges' jurisdiction. *See* "A Constitutional Analysis of Magistrate Judge Authority," 150 F.R.D. at 252 n.12 (collecting cases). In doing so, however, every single court relied heavily on the consent requirement, which these courts understood as requiring the parties to consent *before* referral. For example, the *en banc* Ninth Circuit, per then-Judge Kennedy, stated: "We hold that, in light of the statutory *precondition* of voluntary litigant consent . . . the conduct of civil trials by magistrates is constitutional." *Pacemaker Diagnostic Clinic*, 725 F.2d at 540 (emphasis added). Likewise, the Third Circuit reasoned that the delegation of case-dispositive authority to magistrate judges is constitutional because "the litigants' consent is required *before* a magistrate may act under

section 636(c)." *Wharton-Thomas*, 721 F.2d at 925 (emphasis added). *See also Bell & Beckwith v. United States*, 766 F.2d 910, 912 (6th Cir. 1985) ("[T]he reasoning of *Northern Pipeline* does not apply in situations, such as this one, where the magistrate is acting *with* the consent of the parties.") (Emphasis added.)

In defendants' view, the Magistrates Act does not require pretrial consent, but instead permits a magistrate to preside at trial and enter final judgment as long as no party objects. Their interpretation casts constitutional doubt on the entire referral process, because magistrates would be exercising Article III powers without the consent necessary to alleviate the individual and structural concerns that arise whenever Article III powers are delegated to non-Article III actors. Thus, the "principle of constitutional avoidance" requires that the Act be construed to prohibit post-judgment consent because there is no "evidence that Congress actually intended to permit magistrates to take on a role that raise[s] a substantial constitutional question." *Peretz*, 501 U.S. at 929-30.

II. DEFENDANTS' PRETRIAL SILENCE WAS NOT CONSENT.

Defendants argue that post-judgment "confirmatory consent" satisfies §636(c)(1) as long as the party's "pre-judgment conduct" "clearly evidences consent." Pet. Br. 9. In Withrow's view, as discussed above, the Magistrates Act and Rule 73(b) forbid basing consent on inferences drawn from defendants' pretrial conduct. However, even if the Magistrates Act were read as defendants propose, defendants' pretrial conduct does not satisfy their own standard because their conduct was just as consistent with an intent to withhold consent as to grant it. Thus, defendants could not prevail even on their own terms.

Defendants' counsel refused to give consent when first asked to do so. At the *Spears* hearing, Magistrate Judge Ellington asked Jean Wong, the attorney from the Texas Attorney

General's Office, if the defendants would consent to having her preside at trial and enter final judgment. Ms. Wong responded, "These two cases for today have not been assigned, so *I would not be able to consent at this time*, but the attorneys that will be assigned will be able to make that decision." J.A. 11 (emphasis added). However, defendants Roell and Garibay and their attorney never again addressed the issue, even after defendant Reagan consented and consent was discussed by Magistrate Judge Ellington at two subsequent hearings and before the jury at the start of trial. Thus, despite multiple opportunities to consent, and several reminders that consent is a necessary prerequisite to the magistrate judge's exercise of jurisdiction, defendants Roell and Garibay never consented.

Defendants claim that their pretrial behavior is consistent with consent because they proceeded to try the case before the magistrate without objection. Pet. Br. 29. The Magistrates Act permits magistrates to preside over pretrial proceedings and non-dispositive matters without first obtaining the parties' consent, *see* 28 U.S.C. §636(b), so defendants' participation in such proceedings did not suggest their intention to consent to Magistrate Judge Ellington's exercise of case-dispositive authority. Furthermore, at the time this case was filed, the Fifth Circuit had already stated on numerous occasions that consent cannot be inferred from the parties' actions because a "magistrate judge may act in the capacity of a federal district judge under 28 U.S.C. §636(c) *only* upon the express, written consent of both parties." *McGinnis v. Shalala*, 2 F.3d 548, 551 (5th Cir. 1993) (emphasis in original) (citing *Archie v. Christian*, 808 F.2d 1132, 1137 (5th Cir. 1987) (*en banc*)). Thus, defendants had no reason to think their silence would be understood as consent.

Because defendants' silence did not clearly evidence consent, and, in fact, was just as consistent with an intent to withhold consent, they could not prevail even if their interpretation of the Federal Magistrates Act were correct. Moreover, the difficulty

of ascertaining defendants' mental state from their pretrial conduct illustrates that defendants' "pretrial-conduct-plus-post-judgment-consent" scheme is an unworkable rule that Congress never intended.

III. THE LOCAL RULES OF THE SOUTHERN DISTRICT OF TEXAS PROVIDE AN ALTERNATIVE BASIS FOR AFFIRMING THE FIFTH CIRCUIT'S JUDGMENT.

As stated in Withrow's Brief in Opposition to the Petition for Writ of Certiorari, *id.* at 12-17, the local rules in the Southern District of Texas, which also require explicit pretrial consent, provide an alternative ground for sustaining the Fifth Circuit's decision. Even if defendants were correct that the Magistrates Act itself "does not require a specific form or time of consent" Pet. Br. 13, the local rules of the Southern District of Texas mandate that parties provide *written* consent *before* a case can be heard and decided by a magistrate. Thus, the result in this case does not turn solely on the requirements of the Magistrates Act.

District courts are free to enact local rules of procedure as long as those rules are "consistent with" federal statutes and the Federal Rules of Civil Procedure. Fed. R. Civ. P. 83(a)(1). Even if the Magistrates Act does not require express pretrial consent, as we believe it does, it certainly does not bar district courts from establishing local rules mandating pretrial consent. To the contrary, as discussed above, *supra* at 18, requiring consent before trial promotes the Act's goal of protecting the "voluntariness, knowingness, and willingness of the consent" to referral. *See* S. Conf. Rep. No. 96-322, at 8.

Moreover, both the Magistrates Act and Federal Rule of Civil Procedure 73(b) expressly contemplate that district courts will establish procedural rules governing the use of magistrates, including the timing of consent to referrals. Section 636(c)(2)

of the Act states: "*Rules of court* for the reference of civil matters to magistrate judges shall include procedures to protect the voluntariness of the parties' consent." (Emphasis added.) Federal Rule of Civil Procedure 73(b), in turn, confirms that local rules govern the time period within which the parties must express their consent to the referral: "If, *within the period specified by local rule*, the parties agree to a magistrate judge's exercise of such authority, they shall execute and file a joint form of consent or separate forms of consent setting forth such election." (Emphasis added.) The advisory committee notes explain that "flexibility at the local level is preserved in that local rules will determine how notice shall be communicated to the parties, and local rules will specify the time period within which an election must be made." Advisory Committee Note to Fed. R. Civ. P. 73(b). Thus, the Magistrates Act and Rule 73(b) grant the Southern District of Texas the authority to impose a reasonable deadline by which the parties must consent.

And the Southern District of Texas has done so. As explained above, *supra* at 3-4, General Order 80-5 stated that it is only "*[a]fter the consent form has been executed and filed,*" that the clerk "shall transmit it to the district judge to whom the case has been assigned for approval and referral of the case to a magistrate." Br. in Opp. to Pet. for Cert., App. 7A (emphasis added). Thus, in the Southern District of Texas, the consent form must *first* be executed by all parties, and only thereafter can the case be referred to a magistrate.

Defendants did not comply with the local rule. Although defendants received the requisite notice and form regarding referral to the magistrate as part of service of process, they failed to fill out and return that form. And although Magistrate Judge Ellington mentioned during several hearings that the parties were required to consent to the referral, defendants never did so. *See supra* at 5-6. Defendants' violation of the local requirements is an alternative ground for concluding that

Magistrate Judge Ellington lacked authority to preside over this case.[9]

IV. THE FIFTH CIRCUIT PROPERLY RAISED THE ISSUE OF CONSENT *SUA SPONTE*.

Defendants contend that even if Magistrate Judge Ellington had no authority to conduct the trial below and enter judgment, the Fifth Circuit should not have questioned, *sua sponte*, the validity of that judgment. Pet. Br. 36-44.

As a threshold matter, defendants waived this argument because they did not raise it at any point below. *See, e.g.,*

[9] Although the question whether the local rules for the Southern District of Texas mandate pre-judgment consent was not raised below, the record is sufficient for the Court to decide this issue. *See Blum v. Bacon*, 457 U.S. 132, 137 n.5 (1982) (respondent "may rely upon any matter appearing in the record in support of the judgment below."); R. Stern, et al., Supreme Court Practice 444-45 (8th ed. 2002). The Magistrates Act and Rule 73(b), both of which were discussed in the opinion below, *see* Cert. Pet. App. 3a, allow courts to establish procedures implementing the Act. Because the question whether the Southern District of Texas' local rules required pre-judgment consent is intertwined with the question whether the Act requires (or at least permits) pretrial consent, it should be considered by this Court. *See, e.g., Arcadia v. Ohio Power Co.*, 498 U.S. 73, 77 (1990) (deciding case on an issue that had not been raised by the parties because the issue was "antecedent to these [issues presented] and ultimately dispositive of the present dispute."); *Teague v. Lane*, 489 U.S. 288, 300 (1989) (addressing issue raised only in *amicus* brief).

In the proceedings below, Withrow, a *pro se* prisoner, was unaware that defendants had not consented until that issue was raised by the Fifth Circuit. *See* Withrow's Appellate Br. at 9. Thus, his failure to raise this issue should be excused. Moreover, reliance on the local rules would allow this Court to avoid the constitutional issues involved in addressing the Magistrates Act's consent requirement, *see supra* at 21-24. *Cf. Blum*, 457 U.S. 132 (affirming on statutory ground lower court decision based on constitutional ground). Finally, defendants are not prejudiced by having to address the local rules issue because it is a purely legal issue and it was raised in the opposition to their petition for writ of certiorari. *See* Br. in Opp. to Pet. for Cert. at 12.

Matsushita Elec. Indus. Co. v. Epstein, 516 U.S. 367, 379 n.5 (1996); *Demarest v. Manspeaker*, 498 U.S. 184, 188-89 (1991). Defendants were given an opportunity to submit briefs on the question of consent, or lack thereof, to the district court and then to the Fifth Circuit. Not only did defendants fail to argue that the issue should not be addressed *sua sponte*, they actually maintained in their brief to the Fifth Circuit that "[w]hether all parties consented to [the] Magistrate is a jurisdictional question." Defendants' Appellate Br. at 2. Defendants urged the Fifth Circuit to join the Seventh and Eleventh Circuits in concluding that "'belated' consent cures *jurisdictional* defects." *Id.* at 4 (emphasis added). Defendants are not permitted to take a contrary position for the first time before this Court. *Cf. New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("The doctrine of judicial estoppel prevents a party from asserting a claim in a legal proceeding that is inconsistent with a claim taken by that party in a previous proceeding.") (citation omitted).

In any event, appellate courts have an obligation to question the authority of a magistrate judge to enter a valid judgment. Defendants are correct that lack of consent does not implicate the Fifth Circuit's *subject-matter* jurisdiction over Withrow's case in the sense that his complaint presented a federal question. However, it did deprive the magistrate of any authority to preside at trial and issue a judgment, which is akin to subject matter jurisdiction in that it is a fundamental, structural error that cannot be overlooked by a reviewing court.[10]

[10] The Fifth Circuit never denied that Withrow's case concerned a federal question. Although the Fifth Circuit did not explain what it meant when it referred to lack of consent to a magistrate's entry of a final decision as a "jurisdictional error," Cert. Pet. App. 3a, it did cite to its previous decision in *EEOC v. West La. Health Servs., Inc.*, 959 F.2d 1277, 1282 (5th Cir. 1992), which held that without consent "the magistrate simply lacked the power to try the case and enter judgment in it." (quotations and citations omitted). In *Mendes Jr. Int'l Co. v. M/V Sokai Maru*, 978 F.2d 920, 924 (5th Cir. 1992), also cited in the opinion below, Cert. Pet. App. 3a, the Fifth Circuit explained

Magistrate Judge Ellington is not an Article III judge, and thus she could only exercise Article III power under the carefully circumscribed limits of the Magistrates Act. Section 636(c)(1) empowers a magistrate judge to preside at trial and enter judgment only when the magistrate is designated by a district court and the parties have consented to have her take on that role. Thus, a "judgment" issued by a magistrate without the parties' consent is no more valid and appealable than if it had been issued by a law clerk or courtroom deputy or any other unauthorized, non-Article III actor. Because defendants never consented, Magistrate Judge Ellington's decision was a nullity.

Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III and the statutes enacted by Congress pursuant thereto. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986). "For that reason, every federal appellate court has a special obligation to 'satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review.'" *Id.* (quoting *Mitchell v. Maurer*, 293 U.S. 237, 244 (1934)).

This Court has long held that a defect in the lower court's authority to issue a judgment is the type of jurisdictional error that cannot be excused by a reviewing court. In *Frad v. Kelly*, 302 U.S. 312 (1937), the Court concluded that a judge from the Eastern District of New York who had presided at a trial on temporary assignment in another district had no statutory authority to supervise that defendant's probation after returning to the Eastern District. *Id.* at 318. Although the probation officer and the United States attorney had stipulated that the judge could oversee probation, the judge's orders were

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that such an error results in a "lack of jurisdiction (or at least a fundamental error that may be complained of for the first time on appeal)." In sum, the Fifth Circuit has repeatedly held that lack of consent deprives a magistrate of *authority* to enter a final judgment, and noted that it is the type of error that can and should be raised by the court.

nonetheless "null" because these officers "could not waive the jurisdictional requirements of the Probation Act or by their conduct confer jurisdiction on a judge of another district to act for the trial court in which alone the statute vests the power to deal with the subject." *Id.* at 319.

Likewise, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), the Court considered whether judges from the Court of Claims and the Court of Customs and Patent Appeals can properly be designated to sit as court of appeals judges. The Court addressed the issue despite the parties' failure to raise it below, explaining that:

> when the statute claimed to restrict authority is not merely technical but embodies a strong policy concerning the proper administration of judicial business, this Court has treated the alleged defect as "jurisdictional" and agreed to consider it on direct review even though not raised at the earliest practicable opportunity.

Id. at 535-36 (plurality).

This Court has taken the same position when reviewing decisions issued by magistrates that are beyond the scope of their authority. In *Wingo v. Wedding*, 418 U.S. 461 (1974), the Court concluded that a magistrate had no authority to preside over a federal habeas corpus evidentiary hearing, and thus vacated the opinion and remanded for a new evidentiary hearing before an Article III judge. Similarly, in *Gomez*, which held that a magistrate did not have authority to conduct jury selection absent the defendant's consent, the Court held that the error could not be excused as harmless because the magistrate lacked "jurisdiction to preside." 490 U.S. at 876.

The text and legislative history of the Magistrates Act confirm that failure to satisfy the statutory requirements for referrals deprives a magistrate of jurisdiction, in the sense that the magistrate lacks authority to enter a final judgment. Section 636(c)(1) provides that a magistrate may only issue final

judgments "when specially designated to exercise such *jurisdiction* by the district court or court he serves." (emphasis added). Section 636(c)(2) begins: "If a magistrate judge is designated to exercise civil *jurisdiction* under paragraph (1) of this subsection . . . ." (emphasis added). *See also* §636(c)(3) (same). In the legislative history accompanying the 1979 amendments, Congress explained that it intended to expand magistrates' jurisdiction over civil cases. The Senate Report states that the Bill "provides for case-dispositive *jurisdiction* for magistrates in civil cases where the parties to the litigation consent to the exercise of such power by the magistrate." S. Rep. 96-74, at 1 (emphasis added). In short, Congress viewed the Magistrates Act as extending to magistrates the authority—that is, the jurisdiction—to decide civil cases that they could not exercise without the Act.

Thus, every circuit to have addressed the question has concluded that if a magistrate judge did not have authority to enter judgment under §636(c), then the appellate court lacks jurisdiction to review the merits of that judgment. *See, e.g., McNab v. J. & J. Marine, Inc.*, 240 F.3d 1326, 1327-28 (11th Cir. 2001); *Hajek*, 186 F.3d at 1108; *American Suzuki Motor Corp. v. Kummer*, 65 F.3d 1381, 1385 (7th Cir. 1995); *New York Chinese TV Programs*, 996 F.2d at 23. Because a magistrate's lack of authority deprives her judgment of force and effect, that error cannot be overlooked by a reviewing court.

If defendants were correct that courts could not question, *sua sponte*, the authority of a magistrate to preside at trial and enter final judgment, then the question presented here would be almost completely insulated from judicial review. By definition, magistrates issue decisions without consent *only* when the parties are unaware of the consent requirement, unaware of the absence of consent, or unwilling to draw the court's attention to the issue. Here, for instance, Withrow—who litigated this case *pro se* while in prison—did not realize that defendants had not consented, which is why he did not raise the issue either earlier.

See Withrow's Appellate Br. at 9. Defendants, of course, would never have raised the issue on appeal because they were seeking to preserve their victory at trial. Yet, in defendants' view, Withrow's ignorance and defendants' silence prevented the Fifth Circuit from addressing this fundamental defect.

Furthermore, defendants' view that appellate courts have no right to investigate whether all parties consented is constitutionally troublesome. Defendants argue that "[w]hen a final judgment facially satisfies [28 U.S.C.] §1291, appellate courts should not delve, *sua sponte*, beneath its surface, foraging for a defect that has not drawn an objection and does not implicate the subject-matter jurisdiction of the trial court." Pet. Br. 43 n.17. Following that reasoning, a magistrate judge whose term had expired could purport to enter an appealable decision—with or without the parties' consent, or even their knowledge of the defect—and the appellate court would have to review that judgment if it appeared on its face to be valid.

Furthermore, defendants' logic dictates that had Withrow been the party who did not consent because he had never been told of his right to demand an Article III judge, the issue would *still* have been insulated from appellate review. Thus, defendants would bar courts from questioning whether non-consenting litigants were properly informed of their right to proceed before an Article III judge, which would cast even more serious doubt on the constitutionality of the entire referral system.

Finally, even if defendants were correct that the magistrate's lack of authority to enter a judgment in this case did not *require* the Fifth Circuit to question that authority *sua sponte*, the Fifth Circuit nonetheless had *discretion* to do so. As this Court explained in *Silber v. United States*, 370 U.S. 717, 718 (1962), "appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the

fairness, integrity, or public reputation of judicial proceedings." These criteria are easily met in this case. Withrow was *pro se* and unfamiliar with the procedures of the Magistrates Act. If defendants were correct, by consenting to the magistrate's jurisdiction, Withrow unwittingly bound himself to a judgment that defendants were free to reject. The Fifth Circuit had discretion to correct an error that it found both fundamental and unfair.

CONCLUSION

For the reasons stated above, this Court should affirm the Fifth Circuit's holding that express, pretrial consent is required before a magistrate may exercise the powers that the Constitution has otherwise reserved for Article III judges.

Respectfully submitted,

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APPENDIX

I. The following district courts have established local rules that explicitly require pre-trial consent:

FIRST CIRCUIT:

D. Mass. LR 4(c)(3) (parties must file written consent within 20 days of the filing of answer or other responsive pleading).

D. P.R. LR 509.2 (parties must return signed consent form at least ten days before the pre-trial conference).

SECOND CIRCUIT:

D. Conn. MJR 4(A)(1) ("each magistrate judge may exercise case-dispositive authority in a civil case on the specific written request of all parties, as permitted by 28 U.S.C §636(c)(1), provided the district judge assigned to the case approves").

E.D.N.Y. LR 73.1 (once parties have signed consent form and district judge has approved transfer, clerk shall reassign case to magistrate).

N.D.N.Y. LR 72.2(b)(2)-(3) (the case is forwarded to the district judge for approval and referral of the case to a magistrate only after a completed consent form is filed).

S.D.N.Y. LR 73.1 (once parties have signed consent form and district judge has approved transfer, clerk shall reassign case to magistrate).

W.D.N.Y. LR 72.2(b)(2) (pre-trial consent required).

D. Vt. LR 73.1(e) (magistrate may only exercise authority under §636(c)(1) after all consent forms have been filed and there are no objections).

THIRD CIRCUIT:

D. Del. LR 73.1(c) (consent form signed by all the parties shall be filed with the clerk not later than ten days after the date of the final pre-trial conference).

E.D. Pa. LR 72.1 III.(b)(2) (unless otherwise ordered by the district court judge, consent forms may be filed at any time prior to trial).

M.D. Pa. LR 73.1(b) (consent form signed by all parties must be filed within sixty days after the filing date of the case).

W.D. Pa. LR 72.1.5(E)-(F) (pre-trial consent required).

D. N.J. LR 73.1(d) (consent form signed by all parties to be filed with the clerk not later than 15 days after the final pre-trial conference).

FOURTH CIRCUIT:

M.D. N.C. LR 73.1(a)-(c) (allows referrals to magistrates "after consent" of all parties).

W.D. N.C. LR 73.1(A)-(B) (plaintiff's consent form shall be mailed to the clerk on or before the date that plaintiff seeks service of the complaint; defendant must file executed consent form with his first responsive pleading. If the parties fail to execute the consent forms, the magistrate may proceed, but the parties must file the consent form at the pre-trial conference).

D. S.C. LR 73.02(B)(1) (pre-trial consent required).

S.D. W. Va. LR Mag. J. P. 3.02 (parties must file consent forms prior to trial).

FIFTH CIRCUIT:

N.D. Miss. LR 73.1(B)-(C) (consent form must be filed before trial).

S.D. Miss. LR 73.1(B)-(C) (consent form must be filed before trial).

E.D. Tex. LR 72, Appendix B., R. 3(2)-(3) (pre-trial consent required).

S.D. Tex. General Order No. 2001-6, Art. III (pre-trial consent required).

W.D. Tex. R. 72, Appendix "C", R. 3(b)(1)-(3) (pre-trial consent required).

SIXTH CIRCUIT:

E.D. Ky. LR 73.1 (c) (pre-trial consent required).

W.D. Ky. LR 73.1 (c) (pre-trial consent required).

E.D. Mich., LR 73.1(c) (parties must file a signed consent form, and consent may be entered until thirty days before scheduled trial).

W.D. Mich., LR 73.3-4 (pre-trial consent required).

S.D. Ohio, Eastern Division, Order Dated 7/3/91, IV.A. (parties must file statement indicating consent at least three days before the preliminary pre-trial conference).

E.D. Tenn. LR 72.3(a)(1)-(2) (plaintiff must file consent form within twenty days after defendant's first appearance).

M.D. Tenn., Rule 301(c), L.R.M.P. (parties must file signed form indicating consent within forty-five days of entry of appearance of the last defendant).

W.D. Tenn. LR 72.1(d) (consent required before a proceeding can commence under 28 § U.S.C. 636(c)).

SEVENTH CIRCUIT:

N.D. Ill. LR 73.1 (consent required, either in writing or in open court, before entry of a judgment).

S.D. Ill. LR 72.3(b)(3) (pre-trial consent required).

EIGHTH CIRCUIT:

E.D. Ark. LR 72.1(X)(3) (pre-trial consent required).

W.D. Ark. LR 72.1(X)(3) (pre-trial consent required).

D. Minn. LR 72.1(g)(2) (parties must return consent form to the clerk no later than one week following the initial pre-trial conference or upon order of the district court before a referral can take place).

W.D. Mo. LR 73.1(c) (pre-trial consent required).

D. Neb. LR 73.2(c) (pre-trial consent required).

NINTH CIRCUIT:

C.D. Cal. LR 6.6.3 (consent must be filed at least thirty days before the final pre-trial conference, otherwise it may be filed only with pre-approval of the district judge).

E.D. Cal. LR 73-305(a)-(b) (pre-trial consent required).

D. Idaho LR 73.1 (pre-trial consent required).

D. Mont. LR 73.2(b) (parties have thirty days from service of magistrate judge's designation to complete and return a consent form to the clerk).

D. Nev. LR IB 2-2(b) (pre-trial consent required).

E.D. Wash. LMR 12(d) (pre-trial consent required).

W.D. Wash. MJR 13(4)(d) (pre-trial consent required).

TENTH CIRCUIT:

D. Colo. L.Civ.R. 72.2(D) (written consent to proceed before a magistrate must be filed no later than ten days after the discovery cut-off; if there is no discovery, the parties shall have 40 days from the filing of the last responsive pleading to file their consent).

D. Kan. LR 72.1.3(a)(3) (pre-trial consent required).

E.D. Okla. LR 73.1(C) (the parties may consent to magistrate judge jurisdiction at any time during the pendency of a case).

W.D. Okla. L.Civ.R 73.1(E) (parties must execute and file consent form, after which district judge may approve and refer case for trial before magistrate).

N.D. Okla. LR 73.1(B) (pre-trial consent required).

D. Wyo. LR 73.1(4) (pre-trial consent required).

ELEVENTH CIRCUIT:

M.D. Ala. LR 73.1 (pre-trial consent required).

N.D. Ala. LR 73.2(c) (requiring pre-referral consent within ninety days after the case is filed; after that time, referral is only possible with express permission of the assigned district judge).

N.D. Fla. LR 73.1(A)(1) (requiring pre-trial consent within forty-five days of the date of service of the consent notice).

M.D. Fla. LR 6.05 (pre-trial consent required).

S.D. Fla. MJR 3(b) (pre-trial consent required).

N.D. Ga. LR 73.1(B)(2) (requiring that a joint form consenting to the exercise of jurisdiction by a magistrate judge be filed prior to or concurrent with the filing of the preliminary statement).

S.D. Ga. LR 73.3(b) (consent to disposition of the case by a magistrate judge must be communicated to the clerk on the appropriate form within six months after commencement of the action or at least sixty days prior to any scheduled trial date, whichever first occurs).

DISTRICT OF COLUMBIA:

L. Cv. R. 73.1(b) (notice of consent should be filed prior to entry of a pre-trial order).

II. The local rules of the following districts conform to the language of the Magistrates Act by using the terms "upon" the parties' "consent."

FIRST CIRCUIT:

D. Me. LR 73

FOURTH CIRCUIT:

W.D. Va. MJR 4(c)

FIFTH CIRCUIT:

M.D. La. LR 73.3

W.D. La. LR 73.3

SIXTH CIRCUIT:

N.D. Ohio LR 73.1(a)

SEVENTH CIRCUIT:

C.D. Ill. LR 72.1

N.D. Ind. LR 72.1(h)

S.D. Ind. LR 72.1(h)

EIGHTH CIRCUIT:

N.D. Iowa LR 73.1

S.D. Iowa LR 73.1

NINTH CIRCUIT:

D. Ala. MJR 7

S.D. Cal. LR 72.1(g)

D. Haw. LR 73.1

TENTH CIRCUIT:

D. Utah L. Civ. R. 72-2 (g)

III. The following districts do not specify the timing of consent:

FIRST CIRCUIT:

D. R.I. LR 32(d)(3)

FOURTH CIRCUIT:

D. Md. LR 301(4)

E.D.N.C. LR 73.1(a)

N.D. W. Va. (no local rules about magistrates)

FIFTH CIRCUIT:

N.D. Tx. (no local rules about magistrates)

E.D. Va. LR 72

SEVENTH CIRCUIT:

E.D. Wisc. LR 73.1

W.D. Wisc. LR 2

EIGHTH CIRCUIT:

E.D. Mo. LR 73-11.01

D. S.D. (no local rules about magistrates)

NINTH CIRCUIT:

D. Ariz. LR 2.10(b)

N.D. Cal. LR 72-1

D. Ore. LR 73.1

TENTH CIRCUIT:

D. N.M. LR 73.2(b)

D. Utah L. Civ. R. 72-2(g)

ELEVENTH CIRCUIT:

S.D. Ala. LR 72.2(c)(2)

IV. The District of New Hampshire is the only district that provides that parties waive their rights to an Article III judge if they do not object to the referral to the magistrate within 20 days of receiving notice of the referral. D. N.H. LR 73.1(b)(2)(B).